ISLANDS OF ADVERSARIAL PROCEEDINGS IN THE PROSECUTION PHASE

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Abstract

The islands of the adversarial proceedings encountered in the criminal investigation phase, offer the means of evidence submitted under adversarial conditions extra reliability and are an expression of the guarantees from which the accused person benefits.

*The study is divided into three chapters, it begins with an overview of the **adversarial principle/ principle audi alteram partem** which characterizes the trial phase and is sporadically found in the prosecution phase; in the next section, different concepts and theories are discussed regarding the procedures in the criminal prosecution phase in which the adversarial principle is applicable.*

In its last part, the paper analyzes the effects of the adversarial principle on the reliability of the evidence obtained with its application, the exclusion of the evidence obtained in violation of the adversarial principle and de lege ferenda proposals of the author.

Keywords: *adversarial proceedings, criminal investigation phase, assistance of the counsel/attorney in carrying out any act of criminal investigation/ investigative act, confrontation, expertise procedure.*

1. General remarks

The notion of a fair trial presupposes the existence of an adversarial procedure, which involves the presence of the parties in taking of evidence. The European Court of Human Rights[1] has ruled that the requirements arising from the right to an adversarial procedure are, in principle, the same in both civil and criminal matters.

The principle of adversarial proceedings is closely linked to several principles characterizing the criminal proceedings. The notion of a fair trial in the light of the case law of the ECtHR[2] includes the fundamental right to an adversarial procedure in court. It is closely linked to the principle of equality of arms in the adversarial procedure.

Also, the adversarial principle is complementary to the principle of finding the truth, since the purpose of taking of evidence in adversarial proceedings is to find out the truth in criminal proceedings and to have an identity between objective truth and judicial truth.

From a semantic point of view, the term contradictory comes from the Latin *contradictorius*, which presupposes the existence of an objection, a contradictory point of view.

In philosophy, the dialectical concept was born, which is based on *audi alteram partem*, which is an old form of finding the truth. Opposite opinions are interlinked, so as to arrive at another statement with a higher epistemological content, in order to remove *audi alteram partem*.

In the criminal proceedings, the existence of an adversarial procedure is assessed globally, taking into account the entire criminal proceedings as a whole, from the moment the criminal investigation bodies are notified, until the moment the decision becomes final.

The right to a fair trial presupposes the existence of an adversarial procedure before the court, but there are also adversarial episodes in the criminal prosecution phase, when evidence is materially appraised by the criminal prosecution bodies, or when the proceedings are conducted before the magistrate judge or before the pre-trial chamber judge.

A simple analysis shows that the principle of adversarial proceedings should not characterize a certain procedural stage, but the taking of evidence. In criminal proceedings, the evidence does not have a pre-established probative value, but evidence produced in adversarial conditions ensures that the right to a fair trial is respected, as it offers to all parties the opportunity to participate **in the formation of evidence/in adducing evidence**.

Contradictory proceedings are the right of each party or the main procedural subject to participate in the presentation, showing and proof of the accusation, as well as the right to submit their own defence. Thus, adversarial proceedings represent the possibility of debating before the judge everything that is submitted *de jure* or *de facto* by the opponent and of advancing one's own version of the *de jure* or *de facto* elements.

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[1] Werner v. Austria, § 66.

[2] Renger v. Czech Republic, § 146.

In literature[3], it has been argued that the principle of adversarial proceedings is limited to the principle *audiatur et altera pars* sau *audi alteram parte*, an elementary principle applied in any controversy by virtue of which the views, assertions and arguments by which the parties exercise mutual control over their procedural opponents' assertions are brought to the attention of the court.

The adversarial principle is a fundamental principle that is specific to the preliminary chamber phase and the trial phase of the criminal trial, the criminal investigation being a predominantly non-public phase. However, in the criminal prosecution phase, there are also islands of adversarial proceedings, which provide additional reliability to the evidence produced in adversarial proceedings.

It has been noted in modern Italian literature[4] that evidence is formed dialectally if it is characterized by *audi alteram partem*. Thus, the judge is able to assess the credibility and reliability of the statements made by the person heard, and the parties to the proceedings can contribute by asking the person heard questions. In the accusatory system it is in the interest of justice that the factual situation retained in the acts of the judicial bodies should take place according to the dialectical method and at the same time allows the parties to be guaranteed the right to administer evidence in contradictory conditions.

The principle of adversarial proceedings is not an absolute one, in the jurisprudence of the conventional court[5] it was noted that the extent of an adversarial procedure may vary depending on the specifics of the case.

The criminal investigation phase, despite the fact that it is a non-public procedure, may in some cases also accept elements of adversarial nature. The non-public nature does not imply that this procedure is secret for the parties or for the main procedural subjects. Non-publicity must exist in relation to third parties, those who are not involved in the criminal proceedings, in order not to infringe the rights of those directly involved in criminal proceedings, to respect their privacy and not to infringe the presumption of innocence.

In the criminal investigation phase, the islands of adversarial proceedings presuppose the taking of evidence with the possibility for the parties or the main procedural subjects to participate, directly or through a chosen defence counsel, in the formation of evidence.

With regard to the proceedings in the criminal investigation phase which are taking place before the magistrate judge and the judge of the pre-trial chamber, they can be grouped into three categories by reference to the principle of adversarial proceedings.

The first category of proceedings in the criminal prosecution phase taking place before the magistrate judge or the judge of the preliminary chamber is characterised by a total *audi alteram partem*/adversial procedure, respectively they involve the participation of the prosecutor, the parties and the main procedural subjects, who can formulate opinions, observations, and the judge calls into question the claim, the exceptions and decides on them by reasoned decision.

This category of adversarial proceedings includes a complaint against non-prosecution or non-prosecution proceedings before the Pre-Trial Chamber Judge, an early hearing and a challenge to the length of the trial before the magistrate judge.

The difference between these adversarial proceedings is that any interested party is summoned to resolve the complaint against non-prosecution or 'non-lieu', even if he or she does not have the capacity to be a party or the subject-matter of the main proceedings while in the early hearing and in the appeal regarding the duration of the trial, only the persons who have the capacity of party or main procedural subject are summoned.

The participation of the prosecutor is mandatory, and the non-participation of the other summoned persons does not prevent the resolution of the complaint or the conduct of the early hearing.

The second category of proceedings in the criminal investigation phase carried out before the magistrate judge are characterised by a partial a adversarial proceedings, in the sense that only the persons expressly stated by the legislator participate in the conduct of such proceedings, and not all persons who are party or main procedural subject.

These procedures, including the proposal to take a precautionary measure against a natural person, the proposal to take a precautionary measure against a legal person, the proposal for the provisional application of medical safety measures involve taking measures that involve an interference with the right to liberty of persons.

Partial adversarial proceedings involve exposing the views of both the accuser, the prosecutor, and the person against whom the preventive or medical precautionary measures are sought. It is thus noted that such measures do not involve all persons who have the capacity of a party or main procedural subject, but the active subjects of the criminal legal report against whom the measure is requested and the passive subject of the criminal legal report, who is represented by the prosecutor.

[3] Tr. Pop, *Drept procesual penal*, Universul Juridic Publishing House, Bucharest, 2019, vol. I, p. 322.
[4] P. Tonini, *Manuale di procedura penale*, ventisima edizione, Giufre Francis Lefebvre Publishing House, Milano, 2019, p. 262.
[5] Hudakova and Others v. Slovakia, § 38.

The third category of proceedings in the criminal investigation phase carried out before the magistrate judge are characterised by a total lack of adversarial proceedings.

Only the magistrate judge and the prosecutor participate in procedures which involve the approval of probative proceedings involving a high level of intrusion into private life, namely the proposal for the approval of home search, the proposal for the approval of computer search, the proposal for taking technical supervision measures.

In order for the evidence obtained following such evidentiary proceedings to reflect the objective truth, it is necessary that they be applied in a confidential manner. The participation of other persons in the approval of these proceedings could lead to leakage of information, and the evidence could no longer lead to the overlapping of the objective truth and the judicial one.

In the following part we shall approach the procedure of forming evidence with the assistance of the counsel of the parties or of the main procedural subjects, the confrontation and the procedure of performing the expertise.

2. Counsel assistance in carrying out the criminal investigation acts/ investigative acts

Given the architecture of the New Code of Criminal Procedure, which is based on a continental law system, sprinkled with elements borrowed from the adversarial system, the right of the counsel of the parties or of the main procedural subjects to assist in any criminal prosecution, except where special methods of surveillance or investigation are used and body or vehicle search in the case of flagrant offenses, was regulated.

The regulation of this counsel's right is an island of *audi alteram partem* in the criminal prosecution phase, which is mainly a non-public phase of the criminal trial.

The presence of the counsel in the taking of evidentiary material in the criminal investigation phase, gives an extra reliability to the evidence, as the counsel may object to the evidence produced and may ask questions to the persons heard.

We do not agree with the opinion of some authors[6], who argue that there is a difference between assisting in the conduct of criminal prosecutions, which involves only the physical presence and participation in carrying out acts of prosecution, which also involves the right to object or to ask questions to the persons heard/ interviewed persons/ interviewees.

The term assistance comes from the Latin *asssitere* and means to stand next to someone to defend[7] them. In case the legislator would have wanted the existence of only one objective observer when carrying out the criminal prosecution acts, it would have regulated only the obligation to record audio-video hearings, not the possibility of the counsel of the parties or of main procedural subjects to assist in the criminal prosecution.

The legislator does not distinguish between the term of participation and assistance, and so according to the principle *ubi lex non distinguit, nec nos distinguere debemus*[8] the judicial bodies must allow an effective participation of the counsel in the performance of criminal proceedings.

If the prosecution consists of hearing some persons, the counsel of the parties or of the main procedural subjects has the right to formulate questions and objections. The existence of this right is also confirmed by art. 110 para. (1) of the Criminal Procedure Code, which regulates that in the statement of the defendant / witness / injured person the questions addressed during the hearing shall be recorded, mentioning who formulated them. It would be redundant for the legislator to provide that the statement and the person who made the question should be recorded in the statement, if the prosecuting authority only had been in a position to ask questions.

In addition, art. 92 para. (6) of the Criminal Procedure Code states that in the act to which the counsel assisted the objections formulated by the assisting counsel should be mentioned, which implies that the assistance does not represent the mere physical presence, but also the possibility to formulate objections and criticisms.

In the Italian procedural law system, which is similar to the Romanian one, and in which criminal investigations are generally secret, the obligation of the accused's counsel to participate in "guaranteed" criminal prosecution acts, respectively interrogation, inspection and confrontation, is regulated by art. 329 of the Italian Code of Criminal Procedure.

In such cases, the Public Prosecutor's Office sends a guarantee information to the counsel of the accused, which must contain a brief description of the facts and an invitation to appoint a counsel of choice. If the accused does not appoint a counsel of own choice, the Public Prosecutor shall appoint an *ex officio* counsel. The guarantee information must be provided in accordance with art. 180 of the Italian Code of

[6] Udroiu, Rădulețu, *Codul de procedură penală. Comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2020, p. 493.

[7] See *Dicționarul explicativ al limbii române* (second edition), Romanian Academy, Institute of Linguistics, Universul Enciclopedic Gold Publishing House, 2009.

[8] Where the law does not distinguish, neither should we distinguish.

Criminal Procedure before the interrogation of the accused person or before a criminal investigation is carried out. In case of failure to fulfil this obligation, the documents subsequent to the moment at which the information was to be served, become null and void. The defender has the possibility of an effective participation, by formulating questions and objections.

It is noted that the Italian system of procedural law provides in detail the obligation of the defendant's counsel to participate in the performance of certain acts of criminal prosecution. In addition, the possibility of appointing an ex officio counsel to participate in the compulsory prosecution is regulated, if the counsel of choice refuses to do so.

In the Romanian criminal procedural system, the ex officio counsel appointed by the judicial bodies for one of the parties or main procedural subjects has the right to participate in the execution of investigative acts, and the judicial bodies may attribute to such counsel an obligation to participate in any criminal prosecution, in accordance with art. 91 para. (3) of the Criminal Procedure Code.

In contrast, the criminal prosecution bodies cannot attribute such an obligation to the chosen defence counsel, who has only the power to choose whether or not to assist in the conduct of criminal proceedings.

In the German legal system, according to art. 168c of the German Code of Criminal Procedure (StPO) in the criminal investigation phase, the accused's counsel may participate in the hearing of other persons by the judge, not in the interrogations conducted by the police or prosecutor. If the person they represent is heard, they may participate, but not in the hearing of a witness or an expert.

Consequently, in the accusatory system, the dialectic, which is totally missing in the inquisitorial system, gives major importance to accusation and defence.

2.1. Conditions to be met in order to assist in the conduct of criminal proceedings. Notification on the execution of the investigative act

The right to participate in the execution of the criminal prosecution acts is stated only for persons who have a double capacity as counsel, on the one hand the capacity as counsel in accordance with Law no. 51/1995, and on the other hand the capacity as counsel designated by one of the parties or main procedural subjects.

It is thus noted that the right to witness the conduct of any act of prosecution is not stipulated in favour of the parties, the main procedural subjects or their representatives, but only in favour of the defence counsel of the parties, of the main procedural subjects. For instance, the counsel of the person indicated as the perpetrator in the criminal complaint does not have the right to participate in the performance of any act of criminal investigation, so that the client he represents does not have the quality of party or main procedural subject.

By regulating this right, the legislator pursued the possibility that only law specialists may participate in the performance of the criminal prosecution acts, and not the parties or the main procedural subjects directly. The choice of the legislator is normal, as the presence of the defendant or suspect at the hearing of a witness or injured person may induce a state of fear in the person heard with the consequence of obtaining a truncated testimony.

The jurisprudence of the Supreme Court[9] noted that the presence of only one of the chosen defenders in the criminal proceedings carried out after the formulation of the request for participation does not affect the legality of the evidence or the defendant's right of defence.

2.2. The content of the right to assist in the conduct of criminal proceedings

The right of the counsel of the parties or of the main procedural subjects to witness the performance of any act of criminal prosecution is not an absolute one, the legislator expressly stating the acts of criminal prosecution from which the possibility of participation is exempted, respectively if special surveillance or investigation methods are used and if body or vehicles searches are carried out in the case of flagrant offenses.

Such right of the counsel of the parties or of the main procedural subjects arises a correlative obligation as the duty of the judicial bodies to inform the counsel about the date and time of the execution of the criminal investigation act. Although the legislature does not provide a period of time prior to the act at which the date and time of the criminal prosecution is to be notified, we consider that in order to ensure the effective exercise of such right, it is necessary that the notification be made in a timely manner before performing the act, so that the presence of the counsel at the place of performing the act can be ensured, without disturbing their activity.

The notification shall be made by the judicial bodies by telephone notification, fax, e-mail or by other such means, concluding a report in this respect. The notification should only include the date and time when the criminal investigation act is carried out, and not what act is to be carried out.

[9] HCCJ, crim. s., decision no. 1600/30.04.2009.

In the literature[10], it was noted that the role of the notification is, on the one hand, to ensure the participation of the counsel in the criminal investigation and, on the other hand, to validate the act performed in the absence of the counsel, as long as there is evidence of notification.

In the event legal assistance is mandatory, an *ex officio* counsel will be appointed, who is obliged to participate in the acts in which his presence is mandatory, but the judicial bodies may require such counsel to also appear at the execution of other acts of criminal prosecution during which his presence is not obligatory, ensuring a concrete and effective defence in the case.

Assistance in the execution of criminal prosecution acts does not imply only a passive assistance, but an active participation, when the counsel may formulate objections, which are mentioned in the criminal prosecution act performed by the criminal prosecution bodies.

2.3. Prosecution proceedings in which the counsel may participate

The counsel may participate in any criminal investigation, except in the case where special methods of surveillance or investigation are used and in the case of body or vehicle search in case of flagrant offenses.

In our opinion, the criminal investigation acts represent the acts of the criminal investigation bodies for taking of evidence in order to establish the factual situation and the legal classification.

In the literature[11], prosecuting acts have been defined as those procedural acts performed by criminal prosecution bodies and which concern the gathering of the necessary evidence regarding the existence of crimes, the identification of perpetrators and the establishment of their liability to determine whether it is or not the case to order prosecution.

We do not agree with the definition given to criminal prosecution by part of the literature[12], namely that criminal prosecution acts are only those procedural acts and have a limited scope being those which, after assessing the gathered evidence, provide for continued prosecution, the initiation of criminal proceedings, respectively those which provide for the taking, revocation, replacement or legal cessation of preventive measures or other procedural measures.

According to this definition, the counsel would no longer be able to assist in the taking of evidence in the criminal investigation phase, acts which in the opinion of the aforementioned author are acts of criminal investigation, but only in the procedures of taking, revoking, maintaining, replacing or legal termination of preventive measures or other procedural measures.

The counsel of the parties or of the main procedural subjects cannot effectively participate in the process of evaluating the evidence by the judicial bodies, as this is an intellectual and psychological process.

In the criminal investigation phase we also encounter acts of criminal investigation in which there is an objective impossibility of participation of the counsel of the parties or of the main procedural subjects, considering their nature. For example, the counsel of the parties or the main subjects of the proceedings may not participate in the collection of documents or in establishing a finding. For example, given that these criminal proceedings do not have a place or date, the collection of documents involves only serving the ordinance ordering the taking of measures to the person from whom the documents are collected, and the finding involves only the service of the order ordering the taking of the measure to the specialist who works within or outside the judicial bodies, and the counsel of the parties or of the main procedural subjects is in an objective impossibility to participate in these acts.

The counsel has the right to participate in the performance of any act of criminal investigation, with the exceptions stated by the legislator, without relevance if they are administered directly by the prosecutor / criminal investigation bodies, or by rogatory commission or delegation.

The legislator regulates two exceptions to the right of the counsel to assist in the performance of any act of criminal prosecution. The first exception relates to the fact that the counsel of the parties or of the subjects of the proceedings is not entitled to assist in case of use of special methods of supervision or investigation. In this case, the counsel is not allowed to participate only in the use of special methods of supervision or investigation, and not in the other acts of criminal prosecution that are carried out in the case in which such special methods were used.

The second exception stated by the legislator assumes that the counsel is not entitled to assist in the search of the body or vehicles in the case of flagrant offenses. In the event that no flagrant offense is found, the counsel has the right to participate in the search of the body or vehicles.

In the Romanian literature[13] it was appreciated that the current regulation, which establishes a series of restrictions regarding the counsel's participation in certain criminal prosecution acts, is justified by the

[10] I. Neagu, M. Damaschin, *Tratat de procedură penală, Partea Generală*, Universul Juridic Publishing House, Bucharest, 2020, p. 277.
[11] Gh. Mateuț, *Procedură penală. Partea generală*, Universul Juridic Publishing House, Bucharest, 2019, p. 930.
[12] M. Udroiu, *Sinteze de Procedură penală, Partea Specială*, C.H. Beck Publishing House, Bucharest, 2020, p. 6.
[13] I. Neagu, M. Damaschin, *op. cit.*, p. 276.

special character of the activities carried out for supervision or investigation provided in art. 138. Thus, all such activities are of a confidential nature, on the effectiveness of which depends the use of those evidentiary procedures.

When it comes to the counsel assisting with a home search, there may be several situations. In the event that the search takes place at one of the main parties or subjects of the proceedings, the counsel of the person at whose domicile the search is carried out participates, even if he has not made a request for consent to assist any criminal prosecution, art. 156 para. (9) of the Code of Criminal Procedure.[14] However, the counsel of another party or of the main subject of proceedings, other than the one at whose domicile the search is being conducted, may participate only if the request for assistance in carrying out any criminal proceedings has been granted. In this case, the notification about the performance of the criminal investigation act can be made even after the presentation of the criminal investigation body at the home of the person to be searched.

Although art. 92 para. (1) of the Code of Criminal Procedure states a counsel's right to participate in the conduct of any criminal investigation, which presupposes that the same has the right to participate or not in the prosecution, after being informed of its performance, in case the legal assistance is mandatory, the counsel of the party or of the main procedural subject has the obligation to assist certain acts of criminal investigation.

In order to exercise this right, the counsel of the party or of the main procedural subject makes a request to the judicial bodies to be notified about the date and time of the execution of the criminal investigation act.

In judicial practice[15], the requests for notification regarding the date and time of the criminal investigation act are solved by the prosecutor who supervises the criminal investigation. The analysis of the legal texts shows that the legislator does not regulate the functional or material competence of the criminal investigation body solving such request, so that such requests can be solved either by the prosecutor or by the criminal investigation body conducting the investigations.

The judicial body, which solves the request of notification of the counsel of the party or of the main procedural subject regarding the date and time of the criminal investigation, conducts an examination only regarding the double capacity as counsel of the defender and not regarding the validity of such request. Consequently, an application made by a counsel for notice regarding the date and time of the prosecution may only be rejected as inadmissible if the person making the application does not have the status of counsel, or the person the counsel represents does not have the capacity of counsel of the party or main procedural subject, as a **thorough examination/merits assessment** has not being performed.

The requests for information on the date and time of the prosecution cannot be rejected on the grounds that it would not be appropriate for the counsel to assist in the prosecution.

In the event that the person represented by the counsel acquires the status of a party or main subject of the proceedings after the prosecution, the counsel may request a re-taking of evidence in order to effectively use the right to assist in the performance of any act of prosecution.

2.4. Sanctions in case the counsel is not informed about the date and time of the criminal investigation act

The sanction operating in the case of the execution of criminal prosecution acts, without the knowledge of the counsel, who has made a request for assistance in carrying out any criminal prosecution act, is relative nullity.

Relative nullity is the sanction that intervenes in case of violation of legal provisions other than those expressly regulated by art. 281 para. (1) of the Criminal Code, which always determines the application of absolute nullity. This sanction does not operate automatically, only by violating the legal provisions, but it is necessary to have an injury to the rights of the parties or of the main procedural subjects, which cannot be removed otherwise than by the annulment of the act.

The damage must be related to the "procedural right that, due to the illegal procedural act, the party or other subject can no longer exercise or to the procedural guarantee of which the subject is deprived due to the illegal act, likely to endanger the defence of legitimate interests in criminal proceedings."[16]

Given that the legislator regulated the right of the counsel to assist in the execution of criminal prosecution acts, the disregard of such right by the criminal prosecution bodies that do not fulfil their obligation related to the counsel's right to be informed about the date and time of the criminal prosecution, the

[14] Art. 156 para. (9) Criminal Procedure Code: Persons listed under para. (5) and (6) shall be informed of their right of having a counsel participate in the search conducting. If the presence of a counsel is requested, the search initiation shall be postponed until their arrival, but no longer than two hours of the moment when this right was communicated, and steps for the preservation of the venue to be subject to search shall be taken. In exceptional situations, requiring the conducting of a search on an emergency basis, or when the counsel cannot be contacted, a search can be started even prior to the expiry of the two-hour term.

[15] Order 5053/P/2020 of 06.10.2020 of the Prosecutor's Office attached to the District 1 Court of Bucharest, unpublished.

[16] M. Giurea, I. Lazăr, *Standardul de probă a vătămării procesuale în cazul nulității actelor procesului penal*, in Dreptul no. 4/2018, p. 145.

procedural damage to the right of defence appears to be obvious, and easy to prove.

The nullity of the criminal investigation act performed without the counsel's notice may be invoked at the latest at the closing of the preliminary chamber procedure, if the violation occurred during the criminal investigation and the court was notified by indictment, or until the first trial with the legal procedure fulfilled, if the violation occurred during the criminal investigation, when the court was notified with a guilty plea.

However, the judicial practice is not uniform in terms of the time until which the nullity of the criminal prosecution acts performed without the knowledge of the counsel may be invoked. In a decision of the case[17], the Supreme Court noted that the defendants interested in excluding the witness statement could invoke the exclusion in the criminal investigation phase and could request a retrial. The deadline provided in the content of art. 282 para. (4) of the Criminal Procedure Code should be interpreted in the light of the fact that certain circumstances which give rise to possible nullities could not have been known or capitalized on in the previous phase of the criminal investigation. In reality, the possibly injured could be addressed at the request of the defendants, in the phase of criminal investigation by requesting the re-hearing of the witness.

In a contrary sense, other courts[18] have noted that in the case in which the violation of the legal provisions regarding the hearing of witnesses without the knowledge of the defendant's defence counsel was invoked within the term provided by art. 282 para. (4) letter a) of the Criminal Procedure Code, neither the lateness of its invocation nor any procedural fault for not invoking this illegality during the criminal investigation cannot be retained, all the more so as such an additional condition is not to be found in the content of art. 282 of the Criminal Procedure Code.

We consider that the nullity of the criminal investigation acts performed without the knowledge of the defence counsel of the parties or the main procedural subjects can be invoked within the term provided by art. 282 para. (4) of the Criminal Procedure Code, respectively until the closing of the preliminary chamber procedure if the court was notified by indictment, or until the first court hearing with the legally fulfilled procedure, if the court was notified by plea agreement.

It is not necessary to invoke the relative nullity in the criminal investigation phase, or to have requested the retrial of the persons heard without informing the defence counsel, as this condition is not provided by law, and the judicial bodies are called only to apply the law, not to enact it.

The relative nullity can be invoked by the prosecutor, suspect, defendant, the other parties or the injured person, when there is a procedural interest of its own in complying with the violated legal provisions.

The own interest of the parties and of the main procedural subjects shall be assessed by reference to the rights not taken into account by the violation of the norms of procedural law. For example, the defendant's counsel will not be interested in invoking the nullity of the criminal prosecution acts performed without the knowledge of the injured person's counsel.

During the criminal investigation phase, the prosecutor may ascertain, upon request or *ex officio*, the nullity of the acts performed without the counsel's knowledge and may order the exclusion of the evidence produced. In the pre-trial and trial phase, the prosecutor may request the relative nullity of the acts performed without the knowledge of the counsel of any party or main procedural subject, as the prosecutor's interest is not to formulate and support an accusation, but a general one by reference to its constitutional role is to represent the general interests of society and to uphold the rule of law and the rights and freedoms of citizens.

The relative nullity of criminal prosecution acts performed without the knowledge of the counsel cannot be invoked *ex officio* by the judge of the preliminary chamber or by the court. Initially, according to the provisions of art. 282 para. 2 of the Criminal Procedure Code, the relative nullity could not be invoked in any case by the judge of the preliminary chamber or by the court. However, following the CCR Decision no. 554/2017[19], relative nullity can be invoked ex officio by the judge of the preliminary chamber or by the court, when, by violating a legal provision protected under the sanction of relative nullity, there was not only an injury to the interests of the party but also of justice as well since they prevented the finding of the truth and the just settlement of the case.

Given that the conduct of an act by the criminal prosecution bodies without the knowledge of the counsel of the parties or of the main procedural subjects harms the interests of the party or of the main procedural subject and does not prevent the finding of the truth and fair settlement of the case, the relative nullity of a criminal investigation carried out without the knowledge of the counsel of the parties or of the main procedural subjects cannot be invoked *ex officio* by the judge of the preliminary chamber or by the court.

The damage caused by disregarding the counsel's right to witness the prosecution cannot be covered by taking the evidence in contradictory conditions.

[17] HCCJ, crim. s., sentence of 19.02.2016, unpublished.
[18] Oradea Court of Appeal, conclusion of the preliminary chamber judge of 06.04.2017, unpublished.
[19] Official Gazette of Romania no. 1013/21.12.2017.

In judicial practice,[20] it has been held that in the event of a witness being heard without the knowledge of the party's counsel or of the main subject of the proceedings, the retrial of such witness in the presence of the counsel may not cover the violation of legal provisions, the sanction for non-compliance with the legal provisions for the administration of evidence in the absence of the chosen counsel being the relative nullity prov. by art. 282 of the Criminal Procedure Code, the damage consisting in violating the right to defense conferred by art. 10 of the Criminal Procedure Code, as such damage can no longer be covered other than by annulment of the act. The re-hearing of the witness in the presence of the defendant's counsel does not mean that the nullity would be covered, as long as the prosecutor referred in the indictment to the witness's statement about which the counsel was not informed.

In addition, it cannot be argued that the damage caused by the hearing of a witness by the criminal prosecution bodies without the knowledge of the defence counsel of the parties or of the main procedural subjects can be removed by re-hearing the witness in adversarial conditions in the trial phase. First of all, this remedy, of hearing the witness at a later stage, is a hypothetical one, as there is a possibility that for objective reasons the witness may not be heard later, and his/her statement may be the basis for a conviction. Based on art. 381 para. (7) of the Criminal Procedure Code, if the hearing of any of the witnesses is not possible in the trial phase, and the same made statements in the criminal investigation phase before the criminal investigation bodies, the court orders the reading of the testimony given by the same during the criminal investigation and takes it into account when judging the case.

In this situation, the right to defence guaranteed by art. 6 para. (3) letter d) of the ECHR "*the right of the accused to interrogate witnesses in the trial*".

In order to prevent such situations, in the absence of the possibility to invoke *ex officio* the relative nullity of the criminal prosecution acts performed without the knowledge of the counsel, the courts have found procedural remedies.

In a decision of the case,[21] the court noted that in relation to the importance of infringing on the exercise of their procedural rights by the two defendants, but also to the fact that the statements of the witnesses were used against other defendants, who did not allege that the manner in which such statements were found had violated procedural provisions and caused procedural harm, it was held that the only remedy to counterbalance procedural illegality in criminal proceedings, according to ECtHR case-law, is to establish the possibility of using the three statements only in favour of the defendants, and not against them.

2.5. The effects of the assistance of the counsel of the party or of the main subject of the proceedings on the statements of persons obtained under adversarial conditions

In accordance with the case law of the ECtHR[22] the statements of persons heard in adversarial proceedings may be used by judicial bodies, as opposed to those of persons whom the accused or his defence counsel have not had the possibility to question at any stage of the proceedings, which cannot substantially or decisively substantiate a conviction.

Art. 6 of the ECHR confers the right of the accused to question witnesses in the trial. The term witness has an autonomous meaning and includes any testimony - made by a witness *stricto sensu*, expert, injured person, or a co-defendant, which is likely to substantially substantiate the conviction of the person sent to trial.

The conventional court ruled[23] that not granting the applicant the opportunity, neither in the criminal prosecution phase nor in the trial phase, to ask questions to the experts in order to verify to what extent their opinions were credible, constituted a violation of the provisions of art. 6 of the Convention.

The ECtHR has ruled that the reading of the statements of the witnesses who refused to testify before the court is not, in itself, incompatible with art. 6 of the ECHR, provided that the right of defence is respected. In the literature[24], it was noted that such testimony could not be taken into account if the accused had not been able, at any stage of the previous proceedings, to interrogate the persons whose statements were read at the court hearing and a conviction which was decisively based on the statements made by a person whom the accused or his defense counsel could not interrogate during the proceedings is likely to restrict the right of defence.

This right of the defendant guaranteed by the Convention is not an absolute one, but has been nuanced by the jurisprudence of the ECtHR. The Court noted[25] that the impossibility of the accused to hear the minor witness of 10 years who convicted him for sexual assault is not incompatible with art. 6 of the ECHR, as the defendant's counsel had the opportunity to request

[20] Bucharest Court of Appeal, conclusion of the preliminary chamber judge no. 940/C/2.12.2014, unpublished.
[21] HCCJ, crim. s.., the conclusion of the judge of the preliminary chamber from 22.01.2018, unpublished.
[22] Asch v. Austriche, Serie A, no. 203; Luca v. Italie, Recueil 2001-II.
[23] Baliste-Lideikiene v. Lituanie, Recueil 2008.
[24] C. Bîrsan, *Convenția europeană a drepturilor omului. Comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2010, p. 564.
[25] Asch v. Austriche, Serie A, no. 203.

a second cross-examination and to ask questions through the investigative bodies.

The national provisions provide a lower standard of protection than the ECHR, as there is the possibility that in certain concrete cases, the national legislation, which allows in the trial phase the reading of the testimony given by a witness during the criminal investigation, whose hearing is no longer possible, to be incompatible with art. 6 of the Convention which confers the right of the accused to question or request the hearing of the prosecution witnesses.

Consequently, the testimony of a witness who has been heard before the accused had acquired the status of a suspect, from which time his/her counsel acquires the right to assist in the conduct of any criminal investigation and whose hearing is no longer possible, cannot substantiate determinately or exclusively a conviction, as rights of the defence would be infringed. Despite the fact that the provisions of the criminal procedure, art. 381 para. (7) of the Criminal Procedure Code respectively, allow the reading, in the trial phase, of the testimony of the witness given during the criminal investigation and taking it into account, if the defendant's counsel did not have the possibility to ask questions to the witness, the substantiation of a sentence of conviction exclusively or determinately of such a testimony, is contrary to art. 6 of the ECHR.

It is not necessary for the defendant's counsel to have actually participated in the hearing and to have asked the witness questions, but it is sufficient that the defense counsel had this faculty

Given ECtHR jurisprudence, we can conclude that the testimony of a witness in which the accused's counsel had the opportunity to attend and interrogate him/her may be the basis for the conviction of the accused, if for objective reasons it was no longer possible to hear him/her in the trial phase.

It is therefore in the interest of the investigating bodies that the counsel of the accused has the effective opportunity to attend the hearings of witnesses, injured persons, co-defendants, as adversarial testimony may substantiate a conviction, unlike the one in which the counsel of the accused did not have the opportunity to participate.

For compatibility between national law and the ECHR, which is common to the case law of the Court, we propose to amend art. 381 para. (7) of the Criminal Code so that the court can take into account the testimony of a witness who cannot be heard in the trial stage and who has been heard in the criminal trial stage, only if there has been a possibility that he/she may be questioned by the accused or his/her defence counsel.

3. Confrontation

Confrontation is an evidentiary procedure, which presents elements of *audi alteram partem*. It shall be ordered only where there is a contradiction between the statements of the persons heard in the same case for their clarification.

The evidentiary procedure can be ordered by the criminal investigation body or prosecutor in the phase of criminal investigation and by the court in the phase of trial. The capacity of the confronted persons is irrelevant, and witnesses, defendants, injured persons, experts may be confronted.

In order for the confrontation to be ordered, several conditions must be met. First of all, the confrontation presupposes the previous existence of some statements, since art. 131 para. (1) of the Criminal Procedure Code provides that only when it is found that there are contradictions between the statements of the persons heard in the same case. Secondly, the confrontation presupposes the existence of contradictions between the statements of the heard persons, the purpose of the evidentiary procedure being to clarify such contradictions.

Although the trial usually involves two people who are confronted, the legal provisions do not limit the number of people who can participate in the confrontation.

The confrontation is an island of adversarial nature in the criminal investigation phase, as the criminal investigation body or the court may allow the confrontational persons to ask each other questions.

The evidentiary procedure of the confrontation is different from a hearing in a number of ways. First of all, the free narration phase is missing. Following the evidentiary procedure, a report is drawn up and the hearing is materialized in a statement.

The hearing covers all aspects of the case, all the circumstances and facts that help to establish the factual situation and finding out of the truth, while the confrontation is carried out only relative to the facts and circumstances about which the previously given statements contradict each other.

In addition to the fact that this evidentiary procedure can stimulate the memory of those confronted, it should also be emphasized that the judicial bodies have the opportunity to capture the reactions of those who were confronted, reactions that may reveal the bad faith of those confronted.[26]

The legislator does not stipulate the obligation of the judicial bodies to audio-video record the confrontation process, but it is recommended, as the reactions of the confronted persons can be studied later.

In the event that the confronted persons make false statements during the confrontation, depending on

[26] E. Stanciu, *Tratat de criminalistică*, 6th ed., revised, Universul Juridic Publishing House, Bucharest, 2015, p. 124.

their capacity in the criminal case, witnesses may be held criminally liable for the crime of perjury, if they make false statements about the essential facts or circumstances, and the injured parties may be held liable for the offense of favouring the perpetrator if the purpose of the false statements is to assist the perpetrator in order to prevent or hinder the investigation of a criminal case.

Given that the defendant may retract his statement throughout the criminal proceedings, in the event that he/she makes false statements during the confrontation, his/her criminal liability cannot be incurred.

The adversarial element of the evidentiary procedure is represented by the fact that the confronted persons, with the consent of the court or of the criminal investigation bodies, can ask each other questions. The purpose of the questions is to find out the truth about the facts and circumstances about which the above statements contradict each other.

The evidence of the confrontation may also be attended by the counsels of the main parties or of the subjects who have made a request for assistance in carrying out any act of criminal prosecution, which adds an extra contradictory nature to the procedure.

4. Expertise procedure

Expertise is an evidentiary procedure of great importance in criminal proceedings, which allows clarification or evaluation of facts or circumstances in a specialized field.

The procedure of ordering expertise in the criminal investigation phase is regulated by art. 177 of the Code of Criminal Procedure and presents several elements of *audi alteram partem*, necessary to find out the truth and to guarantee the right to a fair trial.

In the criminal investigation phase, when the criminal investigation body decides to carry out an expertise, it sets a deadline for which the parties, the main procedural subjects, as well as the expert are summoned, if appointed. The criminal investigation body orders by ordinance the performance of the expertise prior to the summoning of the parties, the main procedural subjects.

The appointment of the expert may be ordered by the same ordinance ordering the performance of the expertise, but also by a separate ordinance, following the summoning of the parties, the main procedural subjects.

The contradictory element presupposes the notice of the parties and the main procedural subjects about the object and objectives of the expertise, but also their right to comment on such questions and the possibility to request their modification or completion. For example, the parties and the main subjects of the proceedings may present their own opinions, and the accused may exercise his/her right of defence by requesting the modification of certain objectives, but also by requesting the order of new objectives in defence.

The parties, the main subjects of the proceedings and the expert, if appointed, shall be informed of the expertise subject and the questions to be answered by the expert, the parties shall be informed of their right to comment, to request the modification or deletion of the objectives or to propose other new questions to be answered by the expert. On the same occasion, the expert shall be informed of his/her obligation to analyze the subject matter of the expertise, to indicate the observations or findings and to state an objective, impartial, reasoned opinion in accordance with the rules of science.

Comments on questions, or requests to amend or supplement them, may be made either orally, the prosecuting authorities concluding a report to that effect, or in writing.

The requests of the parties may be admitted or rejected by the criminal investigation bodies, by reasoned ordinance, which also sets the deadline for the completion of the expert report.

Another adversarial element is the fact that an expert recommended by the parties or the main procedural subjects may participate in carrying out the expertise.

If the parties to the proceedings so request and participate in the performance of the expertise and an expert recommended by them, the prosecuting authority shall take note of that request and shall order by order that the application be admitted and that the expert be appointed, provided that he has as an independent expert, authorized in the respective field and not to be in a situation of incompatibility.

The regulation by the legislator of the right of the parties or the main procedural subjects to appoint a recommended expert to participate in the performance of the expertise, which is an episode of adversarial in the criminal prosecution phase, helps to clarify or assess the facts or circumstances that are important to find out the truth.

Only one person who has the capacity of an expert may be appointed by the parties or subjects to carry out the expertise, the main parties or subjects of the proceedings may not participate directly. Moreover, their participation would be redundant if they did not have knowledge of the specialized field in which the expertise is carried out.

Following the participation in the expertise, the expert appointed by the parties may comment on the technical circumstances in which the expertise was performed, which should be included in the expert report made by the expert appointed by the criminal

investigation body, or may draw up an expert report distinct.

Basically, the appointed expert is a chosen defence counsel of the parties or of the main procedural subjects, who has specialized knowledge in a certain field and who can effectively provide assistance to the parties in the field that represents his area of expertise.

In its case law[27], the European Court of Human Rights has held that an expert report can be difficult to challenge without the assistance of another expert in the field. The court is aware that the judge heard a number of proposed defence witnesses, examined several expert opinions and studied various documents. However, the question whether or not the defence enjoyed equality of arms with the prosecution and whether the trial was adversarial cannot be addressed in quantitative terms alone. In those circumstances, the manner in which the evidence was administered determined that the applicant's trial was unfair. The adversarial elements make the means of proof resulting from the probative procedure of the expertise have a reliable position, and the procedure of disposition and performance of this probative procedure guarantees the right of defence of the accused.

The sanction in case of non-compliance with the right of the parties or main procedural subjects to be informed about the performance of the expertise, to formulate objections and requests, or about the right to appoint an expert to participate in the expertise is the relative nullity and exclusion of the expertise report.

In jurisprudence[28] the violation of the provisions of art. 177 para. (1). (2) and (4) of the Criminal Procedure Code. attracts the exclusion of the expertise report. Failure to comply with the indicated criminal provisions has obviously harmed the rights of the defendant which cannot be removed other than by annulment of the act, deprived of the right to comment on questions that the expert is called upon to answer and on the possibility of appointing an expert party. The mere fact that he could raise any objections, in order to order a possible supplement of expertise, is not enough to remove the nullity of the act ordered in violation of the indicated legal provisions.

5. Conclusions

Consequently, the adversarial episodes in the prosecution phase add to the reliability of the evidence and ensure that the right to defence is respected. The non-publicity of the criminal investigation phase is not incompatible with the episodes of adversarial proceedings, which help to find out the truth and clarify the contradictions.

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[27] ECtHR, Matytsina v. Russia, judgement from 27 march 2014, para. 168-2018.
[28] Braşov Court of Appeal, the conclusion of the judge of the preliminary chamber, no. 48/4.05.2016, unpublished.